

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

**ORDER**  
07-CR-29S

COLIN GREENWAY a/k/a "WAYNE SMART",

Defendant.

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1. Defendant is charged in an indictment, issued on February 1, 2007, with: (1) conspiracy to possess and distribute methylenedioxymethamphetamine ("MDMA") in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), all in violation of 21 U.S.C. § 846; (2) carrying and brandishing a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and 2; and (3) destruction of property (marijuana) preventing and impairing the government from taking such property into its custody and control in violation of 18 U.S.C. § 2232(a).

2. On April 24, 2007, this case was referred to the Honorable Hugh B. Scott, United States Magistrate Judge, for all pre-trial matters pursuant to 28 U.S.C. § 636(b)(1)(A) and (B). (Docket No. 22). On May 24, 2007, Defendant Greenway a/k/a "Smart" (hereinafter "Defendant") filed a Motion for a Bill of Particulars. (Docket No. 26). While the preceding motion was pending, Defendant filed another motion seeking to suppress physical evidence and his statement.<sup>1</sup> (Docket No. 39).

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<sup>1</sup>Defendant filed a motion to suppress physical evidence and statements on September 21, 2007, (Docket No. 38), which is identical to the present motion to suppress. However, the motion dated September 21, 2007 was not signed by the Notary. As a result, Defendant re-filed the motion on September 25, 2007. (Docket No. 39).

3. On October 23, 2008, Judge Scott issued a Decision and Order denying Defendant's Motion for a Bill of Particulars. (Docket No. 83). On the same day, Judge Scott also filed a Report and Recommendation recommending that Defendant's motion to suppress physical evidence be denied and that Defendant's motion to suppress his statement be granted. (Docket No. 82).

4. In response to Judge Scott's Report and Recommendation, Defendant filed a Motion for an Extension of Time to File Objections. (Docket No. 85). This Court granted Defendant's motion and set December 3, 2008 as the date by which all objections were due. (Docket No. 86). On December 3, 2008, Defendant and the Government both filed objections to Judge Scott's Report and Recommendation. (Docket Nos. 87 & 88). In the same document wherein he filed objections to Judge Scott's Report and Recommendation, Defendant also appealed from Judge Scott's Decision and Order denying his request for a Bill of Particulars. (Docket No. 87, p. 11).

5. This Court has thoroughly reviewed *de novo* Judge Scott's Report and Recommendation, the Objections thereto, and the applicable law. Upon due consideration, this Court finds no legal or factual error in Judge Scott's recommendation that Defendant's Motion to Suppress physical evidence be denied. Accordingly, Defendant's Objections are denied and this Court will accept Judge Scott's recommendation on this issue.

6. However, this Court offers no view on whether it is prepared to accept Judge Scott's recommendation that Defendants' Motion to Suppress his statement be granted. Without further factual development and analysis by Judge Scott, this Court is not in a position to accept or reject Judge Scott's recommendation on the suppression of Defendant's statement. For example, it is unclear whether the object located in Special

Agent Ulmer's wallet was his Miranda card, whether the object contained the standard Miranda warnings, and where and how Ulmer received this object.

7. Accordingly, this Court will accept Judge Scott's recommendation that Defendant's Motion to Suppress physical evidence be denied, but will recommit this case to Judge Scott to determine whether to receive Agent Ulmer's object into evidence, for any further proceedings he deems necessary, and for the issuance of a Supplemental Report and Recommendation on Defendant's Motion to Suppress his statement that includes a more complete factual discussion after receiving additional evidence. See 28 U.S.C. § 636(b)(1) (upon *de novo* review of a Report and Recommendation, district judge may recommit matter to the magistrate judge with instructions). The Government's objections to the Report and Recommendation granting Defendant's motion to suppress Defendant's statement to Special Agent Ulmer will be denied as moot, without prejudice and subject to renewal, if necessary, to the Supplemental Report and Recommendation.

8. In regards to Defendant's appeal of Judge Scott's Decision and Order denying Defendant's request for a Bill of Particulars, this Court finds no basis to reverse or modify Judge Scott's decision. Pursuant to Pursuant to 28 U.S.C. § 636(b)(1)(A), a magistrate judge may hear and determine any pretrial matter pending before the court.<sup>2</sup> The magistrate judge's order on such a pretrial matter will be reconsidered by the district judge only when it has been established that it is clearly erroneous or contrary to law. Id. Because Defendant does not support his appeal with any evidence whatsoever demonstrating that Judge Scott's decision was clearly erroneous, and this Court has found

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<sup>2</sup>Under this district's Local Rules, review of a magistrate judge's order is governed by 28 U.S.C. § 636(b)(1). See Local Rule of Criminal Procedure 58.2(a)(1).

none upon its own review, Defendant's appeal is denied.

IT HEREBY IS ORDERED, that the Report and Recommendation (Docket No. 82) is ACCEPTED in part and RECOMMITTED in part consistent with this decision.

FURTHER, that the Defendant's Motion to Suppress Physical Evidence (Docket No. 39) is DENIED.

FURTHER, that the Defendant's Objections (Docket No. 87) to the Report and Recommendation to suppress physical evidence are DENIED.

FURTHER, that this Court recommits Defendant's Motion to Suppress his statement to Judge Scott to determine whether Ulmer's object was a Miranda card and whether to receive Ulmer's object into evidence, for any further proceedings that he deems necessary, and for the issuance of a Supplemental Report and Recommendation.

FURTHER, that the Government's Objections to the Report and Recommendation (Docket No. 88) to suppress the Defendant's statement to Special Agent Ulmer are DENIED as moot, without prejudice.

FURTHER, that Defendant's appeal from Judge Scott's Decision and Order (Docket No. 87) denying Defendant's Motion for a Bill of Particulars is DENIED. (Docket No. 26).

SO ORDERED.

Dated: March 3, 2009  
Buffalo, New York

William M. Skretny  
WILLIAM M. SKRETNY  
United States District Judge